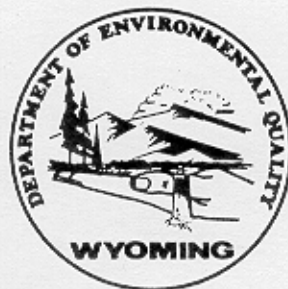


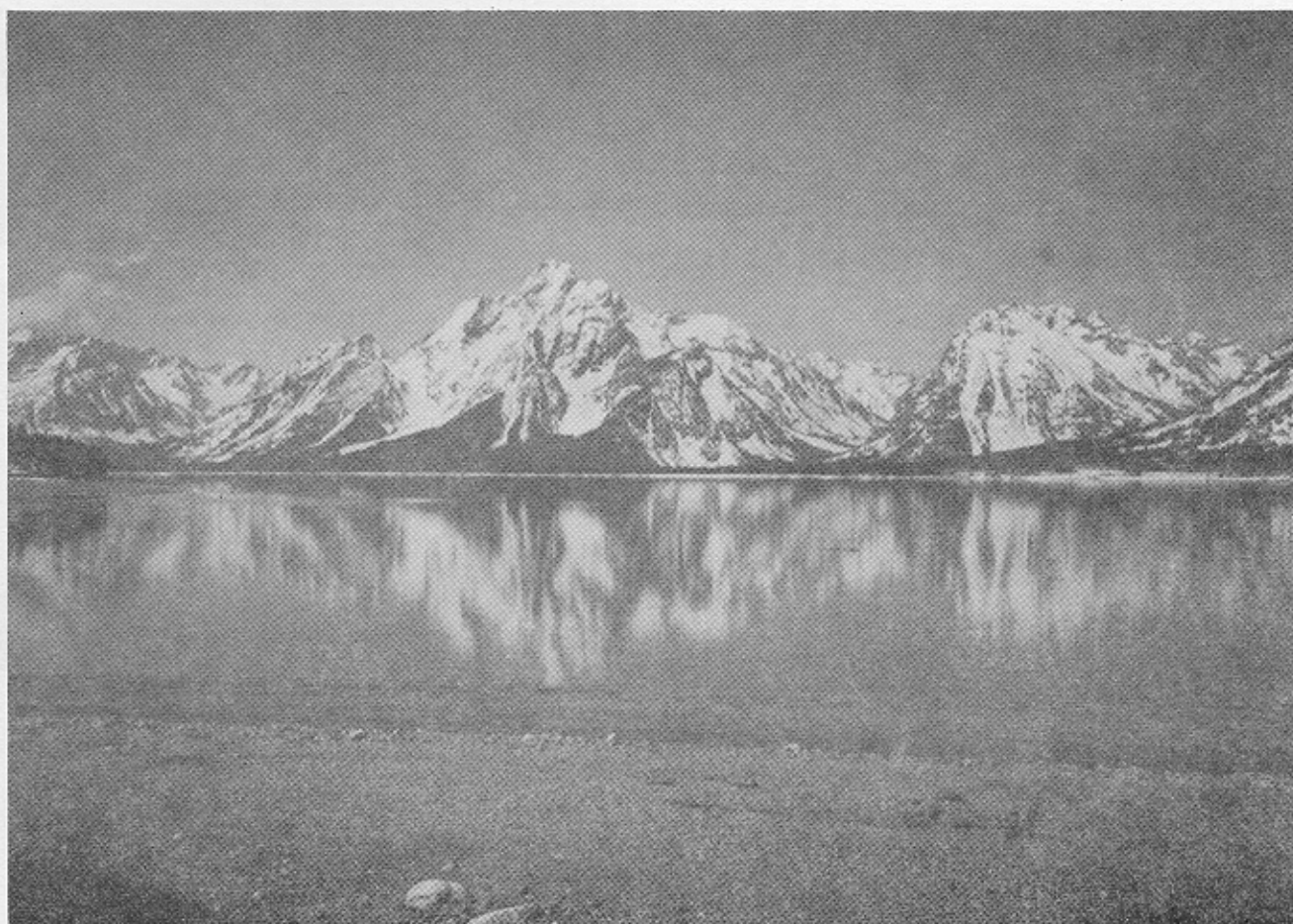


**US Army Corps  
of Engineers**  
Omaha District

# **PROTECTING WYOMING WATERS**



**A Cooperative Effort: by YOU, the  
Wyoming Department of Environmental Quality and  
U.S. Army Corps of Engineers**



**Information and Joint Application Procedures For  
Section 401 of the Clean Water Act  
Section 404 of the Clean Water Act  
Section 10 of the Rivers & Harbors Act of 1899**

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## INTRODUCTION

This pamphlet is designed to assist you in applying for a Department of the Army permit from the Corps of Engineers (Corps) and a Water Quality Certificate from the Wyoming Department of Environmental Quality (DEQ). The pamphlet is not intended to be a complete description of all aspects of the permit program, but will provide general information about the Corps regulatory program and specific guidance on how to complete a permit application. Answers to technical questions and detailed information about special aspects of the program that pertain to your geographical area and your proposed activity may be obtained from either of the Corps regulatory offices or the Wyoming DEQ office listed on this page.

Part I of this pamphlet contains general information on the Corps regulatory program. You should review this section before completing your permit application.

Part II contains a joint application form and instructions for completing the application.

## PART I - GENERAL INFORMATION ON THE REGULATORY PROGRAM

### 1. Regulatory Agencies' Addresses

**Corps of Engineers** - The Omaha District of the U.S. Army Corps of Engineers administers the Corps regulatory program in Wyoming. The Omaha District has established a field office within the State to better serve the public. The primary contact for regulatory matters in Wyoming is:

U.S. Army Corps of Engineers  
Wyoming Regulatory Office  
2232 Dell Range Boulevard, Suite 210  
Cheyenne, Wyoming 82009  
(307) 772-2300  
FAX (307) 772-2920

The Omaha District Corps of Engineers Regulatory Branch may also be contacted concerning regulatory matters in Wyoming as follows:

U.S. Army Corps of Engineers  
Omaha District Regulatory Branch  
ATTN: CENWO-OD-R  
P.O. Box 5  
Omaha, Nebraska 68101-0005  
(402) 221-4211  
FAX (402) 221-4939

**State of Wyoming** - The Wyoming DEQ, Water Quality Division administers the State's regulatory responsibilities in Wyoming. The state office may be contacted as follows:

Wyoming Department of Environmental  
Quality  
Water Quality Division  
Herschler Building  
Cheyenne, Wyoming 82002  
ATTN: Wetlands Program Supervisor  
(307) 777-7781

### 2. Regulatory Authority - Corps of Engineers

In Wyoming, the Corps regulatory authority is based on two Federal laws:

1) Section 404 of the Clean Water Act of 1977 (33 U.S.C. 1344)

2) Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 403)

The Corps is responsible for administering a permit program as set forth in Section 404 of the Clean Water Act. The Clean Water Act of 1977 evolved from the Federal Water Pollution Control Act of 1972. The U.S. Environmental Protection Agency (EPA) has general overall administrative authority for the Act. The objective of the Clean Water Act is "...to restore and maintain the chemical, physical, and biological integrity of the Nation's waters". The purpose of the Corps regulatory permit program in Wyoming is to help implement that goal.

In accordance with Section 404 of the Clean Water Act, a permit is required from the Corps to place dredged or fill material into waters of the United States in Wyoming, including rivers, streams, lakes, intermittent streams, isolated water bodies and wetlands. Any activity involving the placement of fill into waters of the United States requires a Section 404 permit. Typical activities regulated by the Corps include: road fills and bridge crossings; bank protection projects; site development for agricultural, residential, or industrial purposes; pipeline crossings; dams and levees; etc.

Section 10 of the Rivers and Harbors Act of 1899 also established a permit program that is administered by the Corps. The purpose of the Section 10 permit program is to prevent unauthorized alteration of navigable waters of the United States. A Section 10 permit must be obtained before placing any structure in, on, over, or under a navigable waterway. Typical activities requiring permits include: boat docks, irrigation intakes, power lines, dredging, excavating, and filling activities. Flaming Gorge Reservoir is the only waterbody in Wyoming that has been declared navigable by the Corps. Therefore, it is the only waterbody in Wyoming subject to regulation under Section 10.

Because of some overlap in the activities subject to Corps permitting requirements under Section 10 of the Rivers and Harbors Act and Section 404 of the Clean Water Act, the Corps regulatory program is sometimes referred to as the Section 10/404 regulatory program. The Corps Section 10/404 regulations were published in the November 13, 1986 edition of the Federal Register (Vol. 51, No. 219) at 33 CFR Parts 320 through 330. Numerous changes in the program have occurred over the years. The Corps notifies the public of program changes via publication in the Federal Register and through public notices published by the Omaha District and Wyoming regulatory offices.

### **3. Regulatory Authority - State of Wyoming**

The regulatory authorities and responsibilities of the Wyoming DEQ, Water Quality Division, are based on:

- 1) State water quality laws, specifically Article 3, Sections 35-11-301 and 35-11-302 of the Wyoming Environmental Quality Act (W.S. 35-11-101-35-11-1507).

- 2) Section 401 of the Clean Water Act (33 U.S.C. 1344) which requires that the state pollution control agency provide certification that projects requiring a Section 404 permit from the Corps will not impair water quality and violate state water quality standards. Section 401 applies to both the construction and subsequent operation of all facilities involving discharges to waters of the State. In Wyoming, the Environmental Protection Agency (EPA) provides 401 certification on Indian lands.

- 3) Section 402 of the Clean Water Act (33 U.S.C. 1344) which established the National Pollution Discharge Elimination

System (NPDES) to regulate industrial and municipal point source discharges of pollutants into the Nation's waters. Permits are required under the program for both effluent discharges and stormwater runoff from industrial facilities or construction sites. In Wyoming, the NPDES program is administered by the Wyoming DEQ.

4) In addition to determining that proposed work will not violate the applicable water quality standards, the DEQ also makes a determination of additional permit requirements pursuant to the Environmental Quality Act and associated regulations. Additional permits may be required for:

a. The construction of sanitary sewers, public drinking water supplies, water and wastewater treatment facilities, and other miscellaneous facilities;

b. The discharge of pollution to surface or groundwater from point sources including trench or construction site dewatering, stormwater runoff, hydrostatic test water, and sumps or groundwater injection wells; and

c. Activities such as mining, waste hauling and disposal (including dredged material), and land application of treated wastes.

Additional applications are necessary if it is determined that a DEQ permit is required. The Water Quality Division of the Wyoming DEQ should be contacted (see Section 1) for information on state water quality standards described in the Wyoming Water Quality Rules and Regulations.

#### 4. Excavation Activities

As noted above, the Corps regulates the placement of dredged and fill material into wetlands and other waters of the United States as authorized primarily by Section 404 of the Clean Water Act (33 U.S.C. 1344). In order to settle a lawsuit (North Carolina Wildlife Federation, et al. v. Tulloch, Civil No. C90-713-CIV-5-BO[E.D.N.C. 1992]), the Corps published changes to its 1986 regulations in the August 23, 1993 edition of the Federal Register (Vol. 58, No. 163) and began regulating discharges associated with excavation activities such as mechanized landclearing, ditching, channelization, and other activities that destroy or degrade waters of the United States, including wetlands, under what became known as the "Tulloch Rule". As a result of a decision by the U.S. Court of Appeals for the District of Columbia Circuit on June 19, 1998 that overturned the "Tulloch Rule", the Corps amended the definition of dredged and fill material at 33 CFR Part 323 to exclude "incidental fallback". That change was described in the May 10, 1999 edition of the Federal Register (Vol. 64, No. 89). Therefore, the Corps no longer regulates excavation activities if the only discharge is due to incidental fallback. **However, please note that the use of machinery such as bulldozers or front end loaders often results in redistribution or stockpiling of material in waters of the United States and would constitute a discharge of dredged material requiring Department of the Army authorization. Examples of excavation activities that the Corps continues to regulate if they result in filling or leveling jurisdictional areas include: mechanized land clearing, stream channelization, sidecasting of excavated materials, and temporary stockpiling of dredged materials.**

## **5. Unauthorized Activities**

A word of caution. Performing unauthorized work in Wyoming's waters and wetlands or failure to comply with the terms of a permit can have serious consequences. You may be in violation of Federal law and could face stiff penalties, including fines, and be required to implement costly restoration work in impacted waters or wetlands. The Corps and EPA each have authority and responsibility for enforcement of Section 404 of the Clean Water Act. Unauthorized activities may also violate state water quality standards, and you may be subject to legal action by the state. Enforcement is an important part of the Corps regulatory program. Corps surveillance and monitoring activities are often aided by various individuals, groups, and agencies who report suspected violations. When in doubt as to whether a planned activity needs a permit, contact the Wyoming Regulatory Office.

## **6. Wetlands**

Wetlands are considered waters of the United States and are subject to regulation by the Corps and Wyoming DEQ. Wetlands are defined in the Corps regulations as "...those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas." Wetlands provide food, shelter and/or breeding habitat for a variety of wildlife. They may also help decrease flooding erosion by storing floodwater and purify water by taking up nutrients, thereby protecting lakes and rivers. Wetlands also contribute to the recharge of groundwater. Due to their

decreasing numbers, preservation of wetlands is of great concern nationally and within Wyoming. Because of this concern, discharges to wetlands are strictly regulated. If you have any questions as to whether the area where you plan to do the work is a wetland, contact the Wyoming Regulatory Office.

## **7. Jurisdictional Determinations and Wetland Delineations**

The Corps regulates the discharge of dredged or fill material into waters of the United States in Wyoming. The term "fill material" is defined by the Corps as "...any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a waterbody." Relocating material excavated or dredged from a waterbody or wetland within that waterbody or wetland is usually considered a discharge of fill material with some exceptions as noted in Section 4.

The term "waters of the United States" has been broadly defined by statute, regulation, and judicial interpretation. The Corps exercises jurisdiction over the discharge of fill material into Wyoming's major rivers including the North Platte, Snake, Shoshone, Wind, Big Horn, Greybull, Green, Sweetwater, Powder, etc. The Corps also regulates filling activities in smaller creeks and streams, intermittent waterways, lakes, reservoirs, wetlands, and, in many cases, manmade waterbodies and wetlands.

Anyone planning to undertake filling activities in Wyoming waterways and wetlands is strongly encouraged to contact the Wyoming Regulatory Office to ask if authorization is required. The Corps will first determine if they have jurisdiction over the proposed work; i.e., whether it involves the discharge of fill into waters of the United

States in accordance with the Corps regulations. This action is often referred to as a "jurisdictional determination". The Corps may be able to make this determination based on a written or verbal description of the proposed work. If not, a Corps representative may need to visit the site. If the Corps has authority over the proposed work, the project proponent will be advised of the type of authorization that will be required and application procedures.

If the proposed project involves the discharge of fill material into a "wetland" area, it may be necessary to have a wetland delineation done. A "wetland delineation" is a determination that an area is a wetland as defined by the Corps. It usually involves an examination of the site to determine if indicators of wetland vegetation, soils, and hydrology are present. The procedure for making this determination is set forth in the Corps of Engineers Wetland Delineation Manual dated January 1987. Depending on the size and nature of the project, the Corps may be able to do a wetland delineation at the applicant's request. However, due to limited resources and personnel availability, it is often necessary for an applicant to hire a private consultant to do a wetland delineation. In accordance with an inter-agency Memorandum of Agreement signed on January 6, 1994, by the Corps, EPA, U.S. Department of the Interior (Fish and Wildlife Service), and U.S. Department of Agriculture (USDA), farmers and ranchers may get assistance from the Natural Resources Conservation Service in doing wetland delineations on agricultural lands. However, only the Corps has the authority to determine the accuracy of a wetland delineation for Corps permitting purposes. Therefore, all delineations done by applicants, their consultants, or other agency personnel must be referred to the Corps for verification and approval. Further guidance

and information on wetland delineations and consultants is available from the Wyoming Regulatory Office.

## **8. Section 404(b)(1) Guidelines and Alternatives Analysis**

The 404(b)(1) Guidelines are regulations that were promulgated by the EPA in 1980 in consultation with the Corps. The Guidelines set forth criteria to be used by the Corps in evaluating individual permit applications. There are also two memoranda that clarify agency roles and responsibilities relative to implementation of the Guidelines. A Memorandum of Agreement (MOA) signed by the Corps and EPA in 1990 clarified agency responsibilities relative to policy and procedures to be followed in determining mitigation compliance with the 404(b)(1) Guidelines. Another MOA signed by the two agencies in 1993, known as the "flexibility" MOA, commits the agencies to reviewing permit applications under the requirements of the Guidelines based on the relative severity of the environmental impacts resulting from the discharge of dredged or fill material into waters of the United States.

The Corps uses the Guidelines and the Corps public interest review, as set forth in Corps regulations, in evaluating all permit applications. A permit is not issued when it fails to comply with the 404(b)(1) Guidelines and/or is determined to be contrary to the public interest based on the Corps public interest review.

There are several critical elements in the individual permit review process relative to determining that a proposed project involving a discharge into an aquatic ecosystem; i.e., rivers, streams, lakes, wetlands, etc., is in compliance with the Guidelines. By definition, special aquatic

sites (wetlands, et. al.) are accorded special emphasis relative to protection under the Guidelines. Wetlands and other special aquatic sites are recognized for their special ecological functions relative to productivity, wildlife habitat values, and other functions that contribute to overall environmental health of a site or region. There has been a history of significant adverse impacts to the quantity and quality of the Nation's wetlands.

In evaluating a proposed permit application, the Corps must determine if all "practicable" alternatives that would avoid impacts to the aquatic ecosystem have been considered. Practicable alternatives are defined as those available to the applicant taking into consideration cost, logistics, and existing technology. All individual permit applications undergo this review. Alternatives to be reviewed involve various designs of the proposal (including both larger and smaller scales), other sites or locations (including areas not presently owned by the applicant, but could be obtained, utilized, expanded or managed to meet the project purpose), as well as the no action option. It has been the Corps experience that applicants frequently focus on the cost issue when trying to eliminate alternatives available to them. However, just because an alternative is more costly to an applicant, is not necessarily grounds for dismissing the alternative. By the same token, project alternatives shown to be unreasonably expensive may justify elimination of the alternative as practicable.

In addition to the above, the Guidelines set forth the requirement that for nonwater-dependent projects involving special aquatic sites, the presumption is that there are upland alternatives available to the project proponent unless conclusively demonstrated otherwise. In other words, the onus is placed on the applicant to show there are no

practicable upland alternatives to the project. Nonwater-dependent projects are those projects that do not require siting in a wetland or other special aquatic site to fulfill their basic project purpose. For example, housing is usually considered to be a nonwater-dependent project since the basic project purpose is to provide human shelter.

The MOAs between the Corps and EPA further clarified policies in applying the Guidelines to permit review. The 1990 MOA formalized sequencing as a permit review process. Briefly, sequencing means the review process proceeds from the standpoint of the project efforts made to avoid, minimize, and then, and only then, mitigation for adverse impacts to wetlands. The MOA specifically states that mitigation may not be used to reduce the environmental impacts of an alternative to make it the least damaging, practicable alternative. In other words, a project proponent cannot simply offer a mitigation package and forego the need to fully evaluate the practicable alternatives available and avoid and minimize impacts.

In reference to mitigation, the Corps and EPA have agreed that mitigation should be based on an evaluation of the functions and values of a particular wetland. In the absence of definitive site information, mitigation based on a 1:1 acreage replacement ratio may be reasonable. However, the ratio may be higher or lower depending on site-specific information and an evaluation of the likelihood of a successful mitigation project.

The 1993 MOA on application of the 404(b)(1) Guidelines, as noted above, allows the agencies to request information and review permit applications at a level that is consistent with the severity of the environmental impact (as determined by the

functions of the aquatic resource and the nature of the proposed activity) and the scope/cost of the project. This is not to say that readily known or apparent alternatives will be ignored or not investigated, but that the level of information required to make practicability determinations will be limited.

The MOA states that the Guidelines afford the flexibility to adjust the level of scrutiny required in the alternatives review for projects that have only minor impacts. Minor impacts are those that have little potential to degrade the aquatic environment. Minor impacts are characterized by one or more of the following: (1) located in aquatic resources of limited natural function; (2) small in size with little direct impact; (3) have little potential for secondary or cumulative impacts; and/or (4) cause only temporary impacts. According to the MOA, it is not appropriate to consider compensatory mitigation in determining whether a proposed discharge will cause only minor impacts for purposes of the alternatives analysis required by the Guidelines.

Practicable alternatives are those alternatives that are available and capable of being done after taking into consideration cost, logistics, and existing technology. From the view point of cost, the intent of the alternatives analysis is to consider whether the project cost is substantially greater than the costs normally associated with that type of project and not the applicant's financial standing, or investment of market share, a cumbersome inquiry not necessarily material to the objectives of the Guidelines. Generally, as the scope/cost of the project increases, the level of analysis should also increase. For those smaller projects that small homeowners and businesses usually get

involved in, it may be relevant to consider the nature of the applicant and what constitutes a reasonable expense to that applicant.

## **9. Public Interest Review**

When an individual Department of the Army permit is required, a public notice is circulated to Federal agencies including the EPA and U.S. Fish and Wildlife Service, state agencies including the Wyoming Game and Fish Department and Wyoming DEQ, Indian Tribes, local agencies, and interested individuals and organized groups. Comments received are considered in the Corps public interest review of the project.

## **10. Emergency Authorizations**

If you need to do some emergency work that may require a permit, notify the Wyoming Regulatory Office. Emergency authorizations can be granted if the situation poses an eminent threat to life, a significant loss of property, or an immediate unforeseen and significant economic hardship if corrective action requiring a permit is not undertaken. Abbreviated processing procedures are in place to ensure rapid response to requests for emergency authorization.

## **11. When to Apply**

In general, you should apply for your permit as early as practicable, but at least three months before you need to start work. On larger projects you may want to contact the Corps and/or Wyoming DEQ early in your planning process to request pre-application consultation on your proposed project.

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## PART II - APPLICATION FORM

### 1. General Information

To simplify application procedures and to promote interagency coordination, the Corps and Wyoming DEQ have agreed to jointly process permit applications. The Corps provides a copy of submitted applications to DEQ for review in accordance with their authority under Section 401 of the Clean Water Act to determine if the project will comply with State of Wyoming water quality standards. Applicants are encouraged to provide duplicate copies of their applications to facilitate this process.

### 2. Instructions for Completing a Department of the Army Permit Application, ENG Form 4345, Feb 94

An initial application consists of a completed "Department of the Army Permit Application, ENG Form 4345, Feb 94" form and attached drawings describing the project. A copy of ENG Form 4345 and instructions for completing the form are included in this pamphlet. However, additional information is often required from the applicant in order for the Corps and Wyoming DEQ to evaluate the project in accordance with Federal and state regulations and policy guidelines. The Corps and/or Wyoming DEQ will advise the applicant of any additional information required upon receipt of a completed and signed Application for Department of the Army Permit, ENG Form 4345, Feb 94. Applicants are encouraged to contact the Wyoming Regulatory Office if assistance is needed in completing the application.

### 3. Application Submittal

Send one copy of your completed application including drawings and attachments to the Wyoming Regulatory Office at the address listed on page 2. The Corps will forward a copy to the Wyoming DEQ for review. **Fees are required for most individual permits. However, DO NOT SEND A FEE WHEN YOU SUBMIT YOUR APPLICATION.** When the Corps provides you a copy of a permit for signature, you will be asked to submit the required fee. Fees are to be made payable to the Treasurer of the United States.